83 - 1347

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

UNIGARD INSURANCE COMPANY,
Petitioner,

v.

FORMICA CORPORATION and
AMERICAN CYANAMID COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DALE E. FREDERICKS
(Counsel of Record)
ROGER W. SLEIGHT
BERRIDGE R. MARSH
REBECCA A. HULL
SEDGWICK, DETERT, MORAN & ARNOLD
111 Pine Street
San Francisco, California 94111
Telephone: (415) 982-0303
Attorneys for Petitioner
Unigard Mutual Insurance Company

DATED: February 10, 1984

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-6500

QUESTION PRESENTED

Whether a federal court with jurisdiction over an action solely on the basis of diversity of citizenship may disregard controlling state case law and instead rely upon inapposite federal interpretations of state law.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below remain as petitioner or respondents in this proceeding.

Petitioner's subsidiaries and affiliates are: Unigard Olympic Life Insurance Company; Unigard Service Corporation; Unigard Risk Technology, Inc.; Unigard Indemnity Company.

Respondent Formica Corporation is a subsidiary of American Cyanamid Company. Other subsidiaries of American Cyanamid Company are unknown to petitioner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Code Sections

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Unigard Mutual Insurance Company respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on August 26, 1983.

OPINIONS BELOW

The unpublished memorandum opinion of the Court of Appeals for the Ninth Circuit, Unigard Insurance Company v. Formica Corporation and American Cyanamid Company (Nos. 82-4326 and 82-4444) appears, along with the order denying rehearing and rehearing *en banc*, as Appendices A and B, respectively. The unreported order and judgment of the District Court for the Northern District of California appear as Appendices C and D, respectively. Pertinent excerpts from the District Court's oral decision appear as Appendix E.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals for the Ninth Circuit entered judgment on August 26, 1983, and Unigard timely filed petitions for rehearing and rehearing *en banc*. The Court of Appeals denied those petitions on November 14, 1983.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1652 provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This case involves the atypical refusal by both the Court of Appeals for the Ninth Circuit and the District Court for the Northern District of California to apply controlling California case law in an action where jurisdiction is based solely on diversity of citizenship. The Court of Appeals has erroneously affirmed an award of summary judgment against petitioner based upon an uncharacteristically misguided application of inapposite federal decisions. The Ninth Circuit decision thus stands in direct conflict with a line of established California appellate decisions and its refusal to follow that plainly applicable state authority constitutes grounds for review by this Court. *Six Companies of Cal. v. Joint Highway Dist. No. 13*, 311 U.S. 180 (1940); *West v. American Teleph. & Teleg. Co.*, 311 U.S. 464 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940).

The District Court initially perpetrated the error by recognizing the existence of controlling California authority but then rejecting it in favor of relying upon one inapplicable Ninth Circuit decision interpreting California law and a separate district court opinion construing Louisiana law. Never since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) has this been permissible. The Court of Appeals sanctioned this error by refusing even to consider established California authority although both petitioner and respondents briefed and argued the appeal based on California case law. Petitioner comes before this Court seeking issuance of a writ of certiorari to correct a serious miscarriage of justice.

Factual Background.

In this action, Unigard Mutual Insurance Company [hereinafter "Unigard"] seeks to recover from Formica Corporation [hereinafter "Formica"] and American Cyanamid Company [hereinafter "Cyanamid"], Formica's parent company, amounts expended by Unigard in settlement of certain personal injury claims made against Formica and Cyanamid. Unigard had issued a policy of excess liability insurance to Roberts Consolidated Industries [hereinafter "Roberts"] which, beginning in 1969, manufactured, under contract with Formica and pursuant to Formica's specifications, an adhesive product marketed by Formica under the name "Formica Brand Brushable Contact Adhesive No. 140" [hereinafter "Formica 140"]. Respondent Cyanamid had authority and control over the content of warning and precautionary statements placed on Formica 140 product containers.

Two of the personal injury claims were made by Kathleen and Orville L. Smith, who sued Formica and Cyanamid in the United States District Court for the District of Nebraska. The other claims were made by Bertha and Lloyd Ljunggren, who did not file suit. Unigard's insured, Roberts, was not named as a defendant in the Smith's action.

The Smith and Ljunggren claims arose out of an explosion and fire which occurred on January 24, 1975, near Aurora, Nebraska. The claimants were in the process of installing a Formica brand counter top on a kitchen cabinet in the Ljunggren home, using "Formica Brand Brushable Contact Adhesive No. 140" ["Formica 140"], when vapor from the adhesive ignited, causing a flash fire and explosion which resulted in serious personal injuries. The gravamen of the Smith and Ljunggren claims was that the warning and precautionary statements on the Formica 140 container label were inadequate, and failed to provide the claimants with information necessary to safely use the product.

The contract under which Roberts had undertaken to manufacture Formica 140 included the following provisions:

1. Roberts agreed to manufacture Formica 140 according to certain specifications provided by Formica and appended to the contract;

2. Roberts agreed to package and label the product in accordance with the specifications set forth in the contract, and in accordance with any further written instructions provided by Formica;

3. It was provided that "[Formica's] label instructions shall be limited primarily to artwork and the

precautionary statements on the label shall be suggested by [Roberts], *subject to Formica's approval.* . . .";

4. Roberts agreed to "indemnify and hold [Formica] harmless from all losses, costs, expenses, claims, and demands caused by or arising out of the manufacture, sale, handling, storage, quality, labeling, and use" of Formica 140, *"except for losses resulting from the negligence of [Formica]";*

5. Roberts agreed to maintain certain insurance coverage, including comprehensive general liability insurance, with specified limits. The comprehensive general liability insurance was to include both Formica and Cyanamid as additional insureds, *"but only as respects the liability of [Roberts] arising from the contract".*

(Emphasis added.)

Roberts' manufacturing and packaging activities were undertaken at the behest of Formica, and were carried out according to Formica's directions and specifications. Operations regarding the content of label text and format were carried out by Formica, and by the "Label Committee" of Cyanamid.

John A. Evans, Jr., was Market Planning Manager at Formica Corporation between March 1973 and June 1980. In this capacity Evans acted as liaison between the Research and Development Department at Formica and the Label Committee at Cyanamid on the one hand, and suppliers of the Formica 140 product, such as Roberts, on the other. Formica provided its suppliers use instruction language, warning language, the Formica logo, and colors and format for the label.

Evans' department obtained the use instruction information that was passed on to suppliers of the Formica 140 product from the Research and Development Department at Formica. Warning and precautionary language was obtained from the Label Committee at Cyanamid, and the logo or format for presentation of the Formica insignia and colors were obtained from the Formica Corporation Advertising Department. With respect to warning and precautionary language specifically, the Label Committee at Cyanamid decided what language would appear on the label and this information was transmitted through Evans' department to the various suppliers of the Formica 140 product.

It is Unigard's contention that Formica and Cyanamid were negligent or otherwise at fault, and were legally responsible in whole or in part for the injuries which gave rise to the Smith and Ljunggren claims.

Procedural Background.

Unigard filed this action in the Superior Court of California, for the City and County of San Francisco. Formica and Cyanamid removed the action to the United States District Court for the Northern District of California on December 28, 1979, on diversity of citizenship grounds.

On September 18, 1981, Formica and Cyanamid filed a motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, requesting the District Court find, as a matter of law, that:

1. Formica and Cyanamid were "additional assureds" under definition clauses 1(b) and/or 1(c) of the Unigard policy;

2. Unigard had waived or was estopped to assert its right to recover the sums expended by it in settlement of the Smith and Ljunggren claims; and

3. Unigard had failed to reserve its right to contest Formica's and Cyanamid's claims to coverage under the Unigard policy.

On October 16, 1981, the District Court denied the motion for summary judgment as to all issues raised, the court determining that material factual questions remained for trial with regard to each issue.

Thereafter, on November 16, 1981, pursuant to Formica's oral motion for reconsideration of its previously denied summary judgment motion, and on the basis of trial briefs and supplementary briefs filed by the parties at the court's invitation, the District Court reconsidered the issue of Formica's and Cyanamid's claimed status as "additional assureds" under definition 1(b) of the Unigard policy. At the hearing, the court indicated its intention to grant summary judgment in favor of Formica and Cyanamid, on the ground that they qualified as "additional assureds". (See Appendix E.) The court requested additional briefing, however, regarding certain limiting language in the definitional clause of the policy.

A further hearing was held on March 19, 1982. At that time, the District Court granted Formica's and Cyanamid's motion for summary judgment, holding that under definition 1(b)[1] of the Unigard policy, Formica and Cyanamid were "additional assureds". (See Appendix C.)

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[1]Definition 1(b) is set forth in the text at pp. 10-11 *infra*.

Unigard timely appealed to the Court of Appeals for the Ninth Circuit for review of the District Court's decision. After briefing and oral argument, the Ninth Circuit affirmed the lower court's decision on August 26, 1983. (See Appendix A.) The Ninth Circuit, although purporting to apply California law, did not address controlling California appellate decisions even though both petitioner and respondents had briefed and argued the appeal based on California law. Unigard filed timely petitions for rehearing and rehearing *en banc*, which were denied on November 14, 1983. (See Appendix B.)

REASONS FOR GRANTING THE WRIT

Central to the dispute between these litigants is the question whether extrinsic evidence should have been considered by the District Court in ascertaining the meaning of Unigard's policy. The District Court refused to consider such evidence despite a clear holding by the California Supreme Court in *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage Etc. Co.*, 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (1968), that, in California, a court must ascertain and give effect to the intention of contracting parties by determining through reference to extrinsic evidence what the parties meant by the words they used. The Ninth Circuit's affirmance is likewise contrary to this and other California appellate decisions governing contract interpretation.

The District Court specifically acknowledged the existence of controlling California authority[3] but refused to apply it. The relevant portion of the trial court's oral

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[3]*Dart Equipment Corp. v. Mack Trucks, Inc.*, 9 Cal.App.3d 837, 88 Cal.Rptr. 670 (1970), which follows *Pacific Gas, supra.*

decision appears in Appendix D. The transcript shows *inter alia* that the Court stated:

> The plaintiff relies on a California Court of Appeal case, decided in the Second District by Division Five, and written by a Superior [Court] Judge, Judge Frampton, who was assigned pro tem to the court, in which the Judge stated, and I quote in part: "It is a general rule that the intent and meaning of the parties is far more important than the strict literal sense of the words used in the insurance contract. For that reason it is equally important to consider the subject matter of insurance and the purpose or object which the parties had in view at that time."
>
> That may be a general principle applicable to the peculiar facts in that case. But I do not think that it applies in the case at bar; and in any event it is—appears to me to be directly contra to the holding of Judge Sneed in the *Price* [*v. Zim Israel Navigation Co. Ltd.*, 616 F.2d 422 (9th Cir. 1980)] case.
>
> Accordingly, I . . . having granted the motion for reconsideration and having heard for the second time the motion for summary judgment, I now reverse my decision in the first hearing, and grant summary judgment in favor of the defendant.[3]

Petitioner cited the California authority to the Court of Appeals in oral argument and in briefs filed with that court. The Ninth Circuit, in an uncharacteristically superficial opinion, failed even to address that authority, thus sanctioning the District Court's error. As a result, Unigard

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[3]The District Court also improperly applied a case from the United States District Court for the Eastern District of Louisiana which was based on Louisiana law. *Gulf Oil Corp. v. Mobile Drilling Barge or Vessel*, 441 F.Supp. 1 (E.D. La. 1975).

has been denied a trial on the merits of its case, and is now without remedy except in this Court.

THE NINTH CIRCUIT FAILED TO APPLY CONTROLLING STATE CASE AUTHORITY IN DECIDING AN IMPORTANT QUESTION OF STATE LAW

California not only extensively regulates insurance relationships but has also developed a significant body of law interpreting insurance contracts. Through contract interpretation, the courts can and do additionally regulate and define relationships between insured and insurer.

The question raised in the court below is one of insurance contract interpretation to which California law applies. The issue before the District Court on the motion for summary judgment was whether an insurance policy which provides coverage for liability assumed by contract must be construed to reflect the intent of the parties to the underlying manufacturing agreement. The District Court and the Ninth Circuit answered this question "no". The California courts plainly hold to the contrary.

The District Court and the Ninth Circuit based their decision that Formica and Cyanamid were "additional assureds" on the language of definition 1(b) of the Unigard policy:

> The unqualified word "Assured", wherever used in this policy, includes not only the Named Assured but also —
>
> . . .
>
> (b) Any person, organization, trustee or estate to whom the Named Assured is obligated by virtue of a written contract or agreement to provide insurance

> such as is afforded by this policy, but only in respect of operations by or on behalf of the Named Assured or of facilities of the Named Assured or used by them.

Applying California case law as expounded by the California Court of Appeal in *Dart Equipment Corp. v. Mack Trucks, Inc.*, 9 Cal.App.3d 837, 88 Cal.Rptr. 670 (1970), the above definition incorporates into the Unigard policy the terms of the written contract entered into by Formica and Roberts (Unigard's insured). Under the provisions of the Roberts/Formica contract, Roberts was obligated to indemnify Formica (but *not* Cyanamid) "except for losses resulting from the negligence of [Formica]." Formica and Cyanamid were entitled to have Roberts maintain liability insurance, but "only as respects the liability of [Roberts] arising from the [Roberts/Formica] contract."

These provisions demonstrate that (1) Roberts agreed to make Formica and Cyanamid additional assureds *only* to the extent of Roberts' *contractual* obligations arising from the Roberts/Formica agreement, and (2) Roberts had *no* contractual obligation to indemnify Formica for losses resulting from the fault of Formica (and no indemnity obligation at all to Cyanamid). It follows that Roberts had no obligation to make Formica and Cyanamid additional assureds under Roberts' liability policies for losses resulting from Formica's or Cyanamid's own fault. Under the authority of *Dart, supra*, the foregoing provisions of the Roberts/Formica contract operated to limit the existence and scope of coverage which potentially was available to Formica and Cyanamid under the Unigard policy.

The District Court rejected *Dart* and instead applied federal decisions interpreting state (California and Louisiana) law which it thought more correct. This is an improper use of the court's power, because *Dart*, as shown in the following discussion, is dispositive of the issue, and thus provides the rule of decision in this case.

Dart, as lessee of ten trucks manufactured and leased by Mack, signed a lease agreement which provided that the lessee, Dart, "shall indemnify and hold [Mack] harmless from and against any and all claims for personal injury or property damage arising out of the use or operation of the vehicle[s]." *Dart*, 9 Cal.App.3d at 848, 88 Cal. Rptr. at 677. The lease agreement further provided that Dart:

> . . . shall carry and keep in force at [Dart's] expense insurance on the vehicle(s) in insurance companies approved by [Mack] against loss or damage by fire, theft, public liability, property damage, and collision . . . with loss, if any, payable to [Mack] and/or its assigns as its interest may appear . . . .

9 Cal.App.3d at 849, 88 Cal.Rptr. at 678.

The trial court received evidence that, at the time Dart and Mack signed the lease agreement, a Mack representative stated to Dart his concern that Mack "have evidence that [Dart] did have insurance which would cover owner's liability or secondary liability for any acts that [Dart] might perform of negligence in the operation of [its] business. . . . [Dart] said [it] would so furnish that insurance." 9 Cal.App.3d at 842, 88 Cal.Rptr. at 673.

Thereafter, Dart caused Mack to be added by endorsement as an additional insured on its policy, which covered

inter alia, bodily injury and property damage, including liability "assumed by the Insured under . . . a warranty of goods or products." The lease agreement provided that Mack furnish a "manufacturer's standard vehicle warranty" to Dart.

Approximately nine months after the parties executed the lease one of Dart's employees was involved in a single vehicle accident while driving one of the leased trucks. A defective steering mechanism in the Mack truck allegedly caused the accident. As a result of lawsuits filed by Dart and its employee, Mack's insurer paid damages and defense costs for breach of warranty liability imposed against Mack. Cross-Complaints were filed by and against Dart's and Mack's insurers, seeking declaratory relief as to the coverage of the respective policies.

Mack contended that it was entitled to coverage under the insurance policy issued to Dart, and the (certificate) endorsement thereto naming Mack as an additional insured. The Court of Appeal noted:

> The amounts of the coverages are set forth in the certificate. The certificate further provides that it is "Issued to Mack Truck Inc. who is hereby made an additional insured but only as respects liability arising out of the use of automobiles in the business of the named insured, by the named insured, his employees or agents."

9 Cal.App.3d at 843, 88 Cal.Rptr. at 674. The certificate stated that it extended to Mack all of the coverages shown in the policy. Dart, on the other hand, contended that it had never agreed to provide insurance protecting Mack against liability based on Mack's manufacturing negligence, and that the endorsement could not afford more coverage than the underlying contractual agreement had contemplated.

The *Dart* court concluded that the scope of the coverage afforded by the policy endorsement necessarily was limited to the coverage Dart had agreed to provide:

> It is . . . a general rule that the intent and meaning of the parties is far more important than the strict literal sense of the words used in the [insurance] contract. For that reason *it is equally important to consider the subject matter of insurance and the purpose or object which the parties had in view at that time.* It is also proper to consider the business of the parties, the circumstances surrounding the making of the contract, the situation of the property, and all other conditions which have a legitimate bearing upon the intention of the parties.
>
> . . .
>
> In the foregoing circumstances *it was proper for the trial court to receive extrinsic evidence bearing upon the intent of the parties in making Mack an additional insured* under Dart's policy with Exchange. This evidence disclosed that *Mack did not ask Dart to obtain coverage for the manufacturer's strict liability* of Mack, *but only sought coverage for any vicarious liability of Mack arising from the negligence of Dart* in the operation of the leased vehicle in the business of Dart. We are of the opinion that there is substantial evidence to sustain the trial court's finding that *the Exchange policy and the certificate of insurance issued thereunder to Mack did not provide coverage to the latter for manufacturer's strict liability* or the breach of warranty liability.

9 Cal.App.3d at 847-48, 88 Cal.Rptr. at 677 (emphasis added; citations omitted).

In so holding, the *Dart* court followed, without discussing, the decision of the California Supreme Court in *Pacific Gas & Electric Co. v. G. W. Thomas Drayage Etc. Co.*,

69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (1968), which sets forth the rationale for admissibility of extrinsic evidence to explain the meaning of a written instrument under California law. Chief Justice Traynor, writing for the court, stated:

> In this state . . . the intention of the parties as expressed in the contract is the source of contractual rights and duties. *A court must ascertain and give effect to this intention by determining what the parties meant by the words they used.*
>
> . . . [T]he meaning of a writing '. . . can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.'[4]

69 Cal.2d at 38-39; 69 Cal.Rptr. at 564-65, 442 P.2d at 644-45 (emphasis added; footnotes and citations omitted).

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[4]It is worthy of note that *Pacific Gas, supra*, was very close factually to the instant case, as well. In reversing the judgment of the trial court, Justice Traynor stated:

> In the present case the court erroneously refused to consider extrinsic evidence offered to show that the indemnity clause in the contract was not intended to cover injuries to plaintiff's property. Although that evidence was not necessary to show that the indemnity clause was reasonably susceptible of the meaning contended for by defendant, it was nevertheless relevant and admissible on that issue. Moreover, since that clause was reasonably susceptible of that meaning, the offered evidence was also admissible to prove that the clause had that meaning and did not cover injuries to plaintiff's property. Accordingly, the judgment must be reversed.

69 Cal.2d at 40-41, 69 Cal.Rptr. at 566, 442 P.2d at 646 (footnote omitted).

The court went on to specify that extrinsic evidence that may properly be offered to prove the intention of the parties includes evidence as to the "'circumstances surrounding the making of the agreement . . . including the object, nature and subject matter of the writing . . .' so that the court can 'place itself in the same situation in which the parties found themselves at the time of contracting.'" 69 Cal.2d at 40; 69 Cal.Rptr. at 565; 442 P.2d at 645. The California Supreme Court's holding in *Pacific Gas, supra,* has specifically been held to apply to interpretation of insurance policies. See *Diamond v. Ins. Co. of North America,* 267 Cal.App.2d 415, 72 Cal.Rptr. 862 (1968).

Dart is directly on point with the facts of this case. Roberts agreed to indemnify Formica "except for losses resulting from the negligence of [Formica]." Roberts further agreed to maintain insurance for Formica and Cyanamid, "but only as respects the liability of [Roberts] arising from the contract." Similarly, Dart had agreed to indemnify Mack "against any and all claims . . . arising out of use or operation of the vehicle[s]," which the court construed to exclude indemnification for Mack's negligence. 9 Cal.App.3d at 848-49, 88 Cal.Rptr. at 678. Dart also agreed to obtain personal injury and property damage insurance for Mack's benefit. Despite the all-inclusive language of the insurance policy, the *Dart* court found that the parties intended that Dart would obtain insurance *only* for Mack's secondary or derivative liability, and on that basis limited the coverage available to Mack under Dart's policy accordingly.

Mack had been named as an additional insured by endorsement to Dart's policy for all coverage afforded thereunder, subject only to the condition that the insurance was applicable to "liability arising out of the use of automobiles in the business of [Dart]." Similarly, Unigard policy definition 1(b), under which Formica and Cyanamid claim coverage, extends "additional assured" status to entities (although not named) "to whom the Named Assured is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy, but only in respect of operations by or on behalf of the Named Assured . . . ."

As in *Dart*, Formica and Cyanamid claim that, under the language of the insurance policy, they are entitled to coverage even for losses arising from their own fault, despite the fact that Roberts never intended that such coverage be provided. As the *Dart* court stated, the law of California requires that the intent of the parties control over the literal language of the policy.[5] Thus, since it was Roberts' clearly expressed intent and expectation that Formica and Cyanamid would receive coverage only for claims arising from Roberts' liability, California law *requires* that the Unigard policy be construed accordingly. The Roberts/Formica contract expresses the intent of Roberts and Formica, and thus expresses additionally the intent of Unigard, which intended only to carry out Roberts' insurance obligation as set forth in the underlying contract.

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[5]Moreover, under California law, where the reasonable expectations of the named insured and an additional (here unnamed) insured conflict, it is the expectations of the named insured, *i.e.*, Roberts, which control. *Wint v. Fidelity & Casualty Co.*, 9 Cal.3d 257, 264-65, 107 Cal.Rptr. 175, 179-80, 507 P.2d 1383, 1387-88 (1973).

Both the District Court and Ninth Circuit missed completely this well established principle of California law. To consider Formica and Cyanamid additional insureds for all purposes ignores the intent of the parties to the Roberts/Formica contract, in effect rewriting that agreement, so that Roberts and Unigard would be forced to provide insurance far beyond that contemplated or specified in the underlying manufacturing contract. The holdings of the District Court and the Ninth Circuit were thus contrary to the law of California, as expressed by the California Court of Appeal in *Dart, supra,* and its antecedents.

In limited circumstances, where a state has not ruled on a particular point of law, the federal courts have been allowed to ascertain what rule the state court would apply. *Saloomey v. Jeppesen & Co.,* 707 F.2d 671, 674 (2d Cir. 1983). This is not one of those limited circumstances. The California courts have spoken on this issue and there is no indication that the law has changed or should be changed since this pronouncement. In fact, the basic tenet supporting *Dart*—that the intent of the parties to a contract is more important than the strict literal sense of the words used—remains the rule in California. See, *e.g., Leo F. Piazza Paving Co. v. Foundation Constructors, Inc.,* 128 Cal.App.3d 583, 177 Cal.Rptr. 268 (1981); *Western Sierra, Inc. v. Ramos,* 97 Cal.App.3d 482, 158 Cal.Rptr. 753 (1979).

As the foregoing discussion demonstrates, the Ninth Circuit and the District Court were obligated to follow California law in interpreting the Unigard policy. These courts committed grievous error in refusing to construe definition

1(b) of the policy in light of established California case authority. Moreover, if the District Court or the Ninth Circuit believed that there was any doubt as to what coverage Roberts and Formica had intended Roberts to provide, then the factual issue of the parties' intent precluded summary judgment.

THE NINTH CIRCUIT SANCTIONED A SERIOUS DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The District Court, while being directed to controlling California authority, refused to apply that authority and instead applied "Ninth Circuit" law.[4] The District Court stated not that its decision represented California law but rather that it believed the Ninth Circuit case more correct. This departure seriously undermines basic concepts of federalism and the rulings of this Court. Since 1938 it has been established that federal courts sitting in diversity actions must apply state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Two years after *Erie*, this Court decided a case very similar procedurally to the present action. In *Six Companies of Cal. v. Joint Highway Dist. No. 13*, *supra*, petitioners contended that under the law of California, a liquidated damages clause did not apply to delay which occurred after the abandonment of work by the contractor. The Circuit Court of Appeals expressly recognized that its decision was contrary to a California Court of Appeal

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[4]*See* text at pp. 8-9 *supra; see also* Appendix E.

decision, but thought that decision wrong and refused to apply it. This Court reversed, directing counsels' attention to a case decided that same day, *West v. American Teleph. & Teleg. Co.*, 311 U.S. 223 (1940). In *West* the Court stated:

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. *State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule*, however superior it may appear from the viewpoint of "general law" and however much the state rule may have departed from prior decisions of the federal courts.

West, 311 U.S. at 236-237 (emphasis added).

Thus, the federal courts in diversity cases must follow the state court decisions that are rendered in the highest court where a decision may be had. *West*, 311 U.S. at 238.

In the present action, although the District Court and the Ninth Circuit may have thought that they had formulated a superior rule from the viewpoint of "general law", they were obligated under this Court's decisions and the very concept of federalism to follow applicable state decisions. This Court cannot sanction the Ninth Circuit's highly unusual refusal to follow controlling state court decisions.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit. In this instance, the error is so clear that petitioner respectfully suggests that summary reversal and remand are in order. *United States v. Lane Motor Co.*, 344 U.S. 630 (1953); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

DATED: February 10, 1984.

Respectfully submitted,

DALE E. FREDERICKS
(Counsel of Record)
ROGER W. SLEIGHT
BERRIDGE R. MARSH
REBECCA A. HULL
SEDGWICK, DETERT, MORAN & ARNOLD
111 Pine Street
San Francisco, California 94111
Telephone: (415) 982-0303
Attorneys for Petitioner
Unigard Mutual Insurance Company

(Appendices follow)

Appendix A

In the United States Court of Appeals
For the Ninth Circuit

CA Nos. 82-4326, 82-4444
DC No. 79-3962

Unigard Insurance Company,
Plaintiff-Appellant, Cross-Appellee,

vs.

Formica Corporation and American Cyanamid Company,
Defendants-Appellees, Cross-Appellants.

[Filed Aug. 26, 1983]

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California
Honorable William H. Orrick, District Judge, Presiding
Argued and submitted July 13, 1983

Before: TRASK, ANDERSON, and REINHARDT, Circuit Judges.

Unigard appeals from the district court's grant of summary judgment for Formica. The district court held that Formica was an assured within the coverage of an insurance contract between Unigard and the named assured, Roberts Consolidated Industries. Formica cross-appeals from the district court's denial of attorneys' fees. We address each appeal in turn.

The Grant of Summary Judgment

In reviewing this summary judgment, we view the evidence in the light most favorable to Unigard. We will affirm only if no genuine issue of material fact exists and Formica is entitled to judgment as a matter of law. *See Peacock v. Duval*, 694 F.2d 644, 645 (9th Cir. 1982); *Langager v. Lake Havasu Community Hospital*, 688 F.2d 664, 666-67 (9th Cir. 1982); Fed. R. Civ. P. 56(c).

The dispute in this case focuses on the following language from the insurance contract: "[t]he unqualified word 'Assured,' wherever used in this policy, includes . . . any person, organization, trustee or estate to whom the Named Assured [Roberts] is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy." The district court held that to decide whether Formica was an assured pursuant to this provision, one need determine only whether Roberts had contracted to provide insurance to Formica.

Under California law, an ambiguous insurance clause must be resolved against the insurer. *Reserve Insurance Co. v. Pisciotta*, 30 Cal.3d 800, 807-08, 640 P.2d 764, 768, 180 Cal. Rptr. 628, 632 (1982) (en banc). Therefore, "so long as coverage is available under any reasonable interpretation of an ambiguous clause, the insurer cannot escape liability." *State Farm Mutual Automobile Insurance Co. v. Jacober*, 10 Cal.3d 193, 197, 514 P.2d 953, 954, 110 Cal. Rptr. 1, 3 (1973) (en banc). We believe the district court's interpretation of the ambiguous clause was reasonable. We affirm.

Attorney's Fees

In California, parties to an action may agree to compensation for attorney's fees. Cal. Civ. Proc. Code § 1021. The insurance contract in this case provides:

> The Company hereby agrees . . . to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability
>
> • • •
>
> (b) Assumed under contract or agreement by the named assured . . . for damages, direct or consequential and expenses, all as more fully defined by the term "ultimate net loss". . . .
>
> The term ultimate net loss is defined:
>
> The term "Ultimate Net Loss" shall mean the total sum which the Assured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, [or] property damage . . . either through adjudication or compromise, and shall also include . . . all sums paid as . . . law costs, . . . expenses for . . . lawyers, . . . and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder.

Formica is an assured. Furthermore, Formica has incurred legal expenses by defending this cause of action brought by Unigard. The issue is whether those expenses were "paid as a consequence of any occurrence covered hereunder."

Applying the California canon of construction that ambiguities in an insurance contract should be interpreted against the insurer, it is reasonable to assume that Formica's attorneys' fees are a "consequence" of the Nebraska

claims arising from the use of Formica 140. Attorneys' fees should have been awarded to Formica.

Conclusion

The district court's grant of summary judgment in favor of Formica is affirmed. The court's judgment denying attorneys' fees to Formica is reversed and remanded for an award of attorneys' fees in the trial court and on appeal.

Appendix B

In the United States Court of Appeals
For the Ninth Circuit

Nos. 82-4326, 82-4534
CONSOLIDATED WITH
No. 82-4444

Unigard Insurance Company,
Plaintiff/Appellant,

vs.

Formica Corporation and
American Cyanamid Company,
Defendants/Appellees.

Formica Corporation and
American Cyanamid Company,
Defendants/Cross-Appellants,

vs.

Unigard Insurance Company,
Plaintiff/Cross-Appellee.

[Filed Nov. 14, 1983]

ORDER

Before: TRASK, ANDERSON and REINHARDT,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix C

United States District Court
Northern District of California

No. C 79-3962 WHO

Unigard Insurance Company,
Plaintiff,

vs.

Formica Corporation, et al.,
Defendants.

[Filed May 5, 1982]

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A motion having regularly been made by defendants herein, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in the defendants' favor dismissing the action in its entirety on the ground that there is no genuine issue as to any material fact and the defendants are entitled to judgment as a matter of law,

Now, on considering the authorities submitted by the parties, and the affidavits and declarations submitted therewith, and after hearing counsel for the respective parties, and due deliberation having been had, and the decision of the court having been had, and the decision of the court having been stated orally on the record in open court, it is hereby

ORDERED, ADJUDGED AND DECREED that said motion be and the same hereby is granted and that judgment be entered in the defendants' favor dismissing this action in its entirety, with costs and disbursements to be awarded in favor of the defendants and against the plaintiff.

Dated: May 4, 1982

WILLIAM H. ORRICK
United States District Judge

Appendix D

United States District Court
Northern District of California

No. C 79 3962 WHO

Unigard Insurance Company,
Plaintiff,

vs.

Formica Corporation, et al.,
Defendants.

JUDGMENT

A motion having regularly been made by defendants herein for summary judgment in the defendants' favor dismissing the action in its entirety, and the court having made an order pursuant thereto granting the defendants' motion and directing that judgment be entered herein in the defendants' favor dismissing this action with costs and disbursements to be taxed in favor of the defendants and against the plaintiff, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing, that the action be dismissed in its entirety, and that defendants recover their costs and disbursements from plaintiff.

Dated: May 4, 1982

WILLIAM H. ORRICK
United States District Judge
United States District Court
Northern District of California

Appendix E

In the United States District Court
For the Northern District of California

Before: The Honorable William H. Orrick, Judge

Civil No. C-79-3962-WHO
Court of Appeals
Docket No. 6968

Unigard Insurance Company,
Plaintiff,

vs.

Formica Corporation, et al.,
Defendants.

EXCERPTS FROM THE
REPORTER'S TRANSCRIPT
MONDAY, NOVEMBER 16, 1981

(Pp. 56, line 17 through 59, line 19)

THE COURT: (Continuing:) This question comes as the threshold question in the case. And, that is, whether or not the provisions of the Unigard policy are to be limited by terms and conditions contained in a contract to which it is not a party. The so-called—I'll call it the Roberts' Contract.

Now, what all this argument has boiled down to finally is an interpretation of the Unigard policy—of the Unigard policy and definition 1(B).

The . . . 1(B) defines the term "assured," as including "Any person, organization, trustee or estate to whom the Named Assured is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy, but only in respect of operations by or on behalf of the Named Assured or of facilities of the Named Assured or used by them."

Both parties agree that it's necessary to go beyond the insurance policy to determine what person, organization, trustee or estate meets that definition. And both parties agree that they must look at the Roberts' contract.

The defendants' position is that it is necessary only to look at the Roberts-Formica agreement to determine: First, whether the person who claims to be an additional assured is, in the language of the policy, "obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy"; and, secondly, to determine whether "operations by or on behalf of the Named Assured or of the facilities of the Named Assured or used by them" are involved.

The position of the defendant is that that is all the information that need be obtained from the Roberts' agreement.

It is the position of the plaintiff Unigard that not only should the court determine that both of those conditions are fulfilled, but that . . . the court should make a determination as to whether there are any limitations on the obligation to provide the insurance contained in the balance of the contract.

I reject the latter interpretation.

It appears to me that the policy on its face is quite clear; and, namely, that it is to provide liability insurance to . . . any person to whom the named assured is obligated by virtue of a written contract to provide insurance such as is afforded by this policy. And that kind of insurance is liability insurance.

And then you can determine the limitation by ascertaining what operations by or on behalf of the named assured exists, or what facilities of the named assured, or used by them, are meant. And that's all. That's all you have to find out.

This determination is strictly a—an interpretation of law. There are no genuine issues of material fact underlying it. And the law in the Ninth Circuit supports, in my view, the court's decision.

The Ninth Circuit law to which I'm referring is Price against Zim Israel Navigation Company, 616 F.2d 422, which is a Ninth Circuit decision decided by Judge Sneed in 1980, in which Judge Sneed made it clear that the obligations of the insurance carrier in that case, under its policies, were not limited in scope by any underlying contract to which it was not a party.

A similar case is Gulf Oil Corporation against Mobil Drilling Barge Margaret, 441 Fed. Supp. 1, in the Eastern District of Louisiana, a case decided in 1975.

The plaintiff relies on a California Court of Appeal case, decided in the Second District by Division Five, and written by a Superior Judge, Judge Frampton, who was assigned pro tem to the court, in which the judge stated,

and I quote in part: It is a general rule that the intent and meaning of the parties is far more important than the strict literal sense of the words used in the insurance contract. For that reason it is equally important to consider the subject matter of insurance and the purpose or object which the parties had in view at that time.

That may be a general principle applicable to the peculiar facts in that case. But I do not think that it applies in the case at bar; and in any event it is—appears to me to be directly contra to the holding of Judge Sneed in the Price case.

Accordingly, I . . . having granted the motion for reconsideration and having heard for the second time the motion for summary judgment, I now reverse my decision in the first hearing, and grant summary judgment in favor of the defendant.

No. 83-1347

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNIGARD INSURANCE COMPANY,
Petitioner,

vs.

FORMICA CORPORATION and
AMERICAN CYANAMID COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEROME I. BRAUN
(Counsel of Record)
WILLIAM R. FRIEDRICH
STEPHEN E. CONE
FARELLA, BRAUN & MARTEL
235 Montgomery Street,
Suite 3000
San Francisco, CA 94104
Telephone: (415) 954-4400
Attorneys for Respondents Formica Corporation and American Cyanamid Company

DATED: March 14, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-6500

QUESTION PRESENTED

Petitioner Unigard Insurance Company has failed to present any question of significance to this Court. The question posed by Unigard in its Petition raises no issue at all, but is merely an attempt to frame an issue of interest to this Court, where none otherwise exists. Indeed, respondents agree with Unigard that a federal court with jurisdiction over an action on the basis of diversity of citizenship may not disregard controlling state law. The dispute in this case is whether the particular state court decision upon which Unigard relies is controlling or apposite. Thus, if any question is raised by the Petition for Writ of Certiorari, it is whether this Court should disturb the conclusion of the district court in ascertaining and applying state law, given the deference normally accorded to a district court judge in a diversity cases in ascertaining the law of the state in which he or she sits.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below remain as petitioner or respondents in this proceeding.

Subsidiaries and affiliates of petitioner Unigard Insurance Company are unknown to respondents.

Respondent American Cyanamid Company is the parent company (with 100% ownership) of respondent Formica Corporation. The remaining subsidiaries (other than wholly owned subsidiaries) and affiliates of respondent American Cyanamid Company are: Agustin A. Balaguer & Cia., Ltda.; Arizona Chemical Company; Arizona Chemical Overseas Corporation; Arizona Chemical Service Corp.; Bartley Coaters Limited; B. Braun—Dexon GmbH; B.

Braun—Dexon, S.A.; Brewster Phosphates (a Partnership); Burford Fertilizers Limited; The Catalyst Company (a Partnership); Ceresdale Fertilizers Limited; Chemacryl Plastics Limited; Colfax Laboratories (India) Private Limited; Cyanamid Fothergill Limited; Cyanamid Iberica, S.A.; Cyanamid India Limited; Cyanamid Italia S.p.A.; Cyanamid-Ketjen Katalysator B.V.; Cyanamid (Pakistan) Limited; Cyanamid (Portugal) Limitada; Cyanamid Taiwan Corporation; Cyanamire S.r.l.; Cyanenka S.A.; CYRO Industries (a Partnership); Cysol (a Partnership); Cytogen Corporation; Esterfarm Laboratori Farmaceutical S.r.l.; Societe Anonyme Formica; Formica Espanola S.A.; Formica GmbH and Co. KG (a limited Partnership); Formica Plastics Pty. Limited; Hopewell International Company Ltd.; Kent County Fertilizers Limited; Laboratorios Layre Limitada; Laminate Industries (Proprietary) Limited; Lederle (Japan), Ltd.; Lederle (Nigeria) Limited; Les Engrais Chimiques Levis Limitee; Les Engrais Chimiques Victoria Limitee; Les Engrais Saint-Gregoire Inc.; Mitsui-Cyanamid Limited; Molecular Genetics, Inc.; Ralph Dale Fertilizers Limited; Sherkat Sahami Cyanamid-KBC; Skyway Fertilizers Limited; Societe des Aiguilles Suturex (S.A.R.L.); Societe des Sutures Chirurgicales; Sutumex, S.A. de C.V.; Takeda Italia, S.p.A.; TDF Tiofine B.V.; Tiofine Pigmente GmbH; United Insurance Company; and, YuHan-Cyanamid, Inc.

The subsidiaries (other than wholly owned subsidiaries) and affiliates of respondent Formica Corporation are: Societe Anonyme Formica; Formica Espanola S.A.; Formica GmbH and Co. KG (a limited Partnership); and Formica Plastics Pty. Limited. In addition, all subsidiaries

and affiliates of American Cyanamid Company are affiliates of Formica Corporation.

There are numerous other subsidiaries owned wholly by American Cyanamid Company, Formica Corporation, or a combination of the two.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

TABLE OF AUTHORITIES

STATE CASES

TABLE OF AUTHORITIES

State Statute

Secondary Authority

No. 83-1347

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

UNIGARD INSURANCE COMPANY,
Petitioner,

vs.

FORMICA CORPORATION and
AMERICAN CYANAMID COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Formica Corporation and American Cyanamid Company respectfully pray that this Court deny the Petition of Unigard Insurance Company for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Unigard Insurance Company ("Unigard") sued Formica Corporation ("Formica") and American Cyanamid Company ("Cynamid") to recover approximately $633,000 (together with attorneys fees and costs) which it paid in

settlement of four claims against Formica and Cyanamid. Two of those claims were the subject of a personal injury lawsuit filed in the United States District Court for the Northern District of Nebraska ("Smith action"). The other two claims ("Ljunggren claims") were settled without suit being filed. (These four claims will sometimes be referred to collectively as the "Nebraska claims".)

Unigard contends that Formica and Cyanamid were negligently responsible in whole or in part for the injuries out of which the Nebraska claims arose. Unigard interprets its policy as not insuring Formica and Cyanamid for their own negligence. Based on that interpretation, Unigard asserts that the factual issue of Formica's and Cyanamid's possible negligence must be resolved before any legal conclusion can be drawn regarding coverage under the Unigard policy. The issue of respondents' negligence has never been tried, however, since the district court disagreed with Unigard's interpretation of the policy.

The district court interpreted Unigard's insurance policy as a matter of law, holding that regardless of their possible negligence, Formica and Cyanamid are insured under the policy, and that therefore, Unigard is precluded as a matter of law from recovering from Formica and Cyanamid. The Court of Appeals for the Ninth Circuit affirmed the judgment in favor of Formica and Cyanamid. Viewed as simply as possible, this is a case in which the lower courts interpreted an insurance policy in favor of the insured.

Contrary to Unigard's characterization, there is nothing atypical about the handling of this case by the Court of Appeals for the Ninth Circuit. While the Ninth Circuit's

decision is brief, that brevity is obviously not the result of any lack of consideration by the Ninth Circuit, but of that court's conclusion that Unigard's arguments are directly contrary to well-established California law regarding the interpretation of insurance policies.

Neither the Ninth Circuit, nor the district court, refused to apply controlling California case law in deciding this diversity case. On the contrary, the Ninth Circuit decision is expressly based on holdings of the California Supreme Court. (See Appendix A to Petition for Writ of Certiorari.) More importantly, the record is clear that the district court, in granting summary judgment, considered and distinguished the precise California case law upon which Unigard bases its Petition. (See Appendix E to the Petition for Writ of Certiorari.) In the absence of a controlling state court decision, the district court did exactly what it was required to do—it looked to the Ninth Circuit's interpretation of California law in analogous situations and to the law of other jurisdictions which have dealt with the issue. *See Lewis v. Anderson,* 615 F.2d 778 (9th Cir. 1979), *cert. denied,* 449 U.S. 869 (1980); *Liberty Mutual Insurance Co. v. United States Fidelity & Guaranty Co.,* 232 F.Supp. 76, (D.Mont. 1964); 1A Moore's Federal Practice, § 0.309[2] at p. 3124 (1978). Thus, there is no error for this Court to correct.

Factual Background

1. The Nature of the Nebraska Claims

The Nebraska claims involve injuries suffered by the Smiths and Mr. Ljunggren in an accident which occurred

in January of 1975 while they were using a product known as "Formica Brand Brushable Contact Adhesive #140" ("Formica #140"). The primary contentions of the Smiths' Complaint were as follows:

(a) That Formica #140 was highly inflammable and explosive and was inherently dangerous;

(b) That the danger of Formica #140 was so great that the product should not have been available to the general public;

(c) That Formica #140 was not properly tested before it was made available to the general public; and,

(d) That Formica #140 was inadequately labeled with the result that users were not adequately warned of the extreme danger of the product.

The Complaint in the Smith action sought damages of $6 million.

2. The Roberts-Formica Contract for the Manufacture of Formica #140

At the time of the accident, Formica #140 was being manufactured by, among others, Roberts Consolidated Industries ("Roberts"), pursuant to a contract entered into between Roberts and Formica in December of 1969. The contract ("Roberts-Formica contract") related to the manufacture, packaging, labeling and distribution of Formica #140 and contained the following provisions:

(1) Shipments of Formica #140 were to be made directly from Roberts to Formica's customers.

(2) Roberts warranted that Formica #140 would conform to certain *performance* specifications.[1]

(3) Roberts agreed to package and label the Formica #140 in accordance with specifications in the contract and in accordance with Formica's further written instructions, if any. The contract provided that "[Formica's] label instructions shall be limited primarily to artwork and the precautionary statements on the label shall be suggested by [Roberts], subject to [Formica's] approval; provided that [Formica's] approval shall not relieve [Roberts] of its responsibility for said statements as hereinafter set forth."

(4) Roberts represented and warranted that the Formica #140, its containers and labels would comply with all applicable laws and regulations.

(5) Roberts agreed to "indemnify and hold [Formica] harmless from all losses, costs, expenses, claims and demands caused by or arising out of the manufacture, sale, handling, storage, quality, labeling and use" of Formica #140, "except for losses resulting from the negligence of [Formica]." Roberts further agreed, at its own expense and risk, to provide and undertake the investigation, handling and defense of any such claims.

(6) Roberts agreed to provide and maintain in force insurance coverage, including comprehensive general liability, with minimum limits of liability of $300,000 combined

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[1]Unigard implies in its Petition that Roberts manufactured the adhesive according to Formica's formula. In fact, Roberts was the adhesive expert, and was permitted to use any formula it wished, so long as the finished product performed according to Formica's performance specifications.

bodily injury and property damage, for each occurrence, and $1 million in the aggregate. Such policy was to provide that the insurance is primary, with no recourse to any insurance carried by Formica. In addition, the comprehensive general liability policy was to include Formica and Cyanamid as additional insureds, but only as respects the liability of Roberts arising from the Roberts-Formica contract.

3. Roberts' Insurance Coverage

From October 31, 1973, to the filing of the Smith action in September, 1976, Roberts was insured under a series of comprehensive general liability policies issued to its then parent company, Champion International Corporation ("Champion") by Liberty Mutual Insurance Company ("Liberty Mutual"). The Liberty Mutual policies provided bodily injury liability coverage to Roberts in the amount of $300,000 per occurrence and $300,000 aggregate.

Unigard provided excess coverage to Roberts under its umbrella liability policy with a policy period of October 31, 1973 to October 31, 1976 ("Unigard policy"). The Unigard policy provided coverage to Roberts in the amount of $5 million per occurrence and $5 million aggregate, over the $300,000 limits of the Liberty Mutual policies.

4. The Resolution of the Nebraska Claims

Formica was served with Summons and Complaint in the Smith action on September 9, 1976. Cyanamid was added as a defendant in an Amended Complaint filed August 12, 1977. Roberts was never made a party to the Smith action.

Formica tendered the defense of the Smith action to Roberts. Champion, Roberts parent company, acknowledged the tender of defense and requested evidence that Roberts

had in fact manufactured the adhesive involved in the Smith action. On September 29, 1976, Unigard was placed on notice of the Smith action by Champion's broker. Following an investigation, it was established to the satisfaction of all concerned that the adhesive involved in the Nebraska claims had probably been manufactured and packaged by Roberts. Thereafter, Liberty Mutual (and later, Unigard) retained counsel to defend Formica and Cyanamid in the Smith action.

The Smith action settled on the third day of trial, in July, 1978, for $850,000. Of this amount, Liberty Mutual paid $296,449 (the remaining limits on its $300,000 policy) and Unigard paid $553,551. Shortly thereafter, Unigard paid an additional $80,000 to settle the Ljunggren claims.

PROCEDURAL BACKGROUND

So far as it goes, Formica and Cyanamid adopt Unigard's statement of the procedural background in this case. It should be noted, however, that Unigard did not seek a rehearing in the Ninth Circuit on the issue raised in its Petition for Writ of Certiorari. Indeed, the Petition for Rehearing and Rehearing *En Banc* in the Ninth Circuit did not relate to the summary judgment at all, but to the Ninth Circuit's award of attorneys fees to Formica and Cyanamid.

REASONS FOR DENYING THE WRIT

The question presented by Unigard in its Petition is one which virtually answers itself. Indeed, Formica and Cyanamid do not dispute Unigard's answer to the basic question it poses—a federal court with jurisdiction over an action solely on the basis of diversity of citizenship

may not disregard controlling state case law and instead rely upon inapposite federal interpretations of state law.

The flaw in Unigard's position is not in the logic of its argument, but in the premise upon which the argument is based. Unigard asserts, incorrectly, that the district court and the Ninth Circuit disregarded controlling state case law. In fact, the case law upon which Unigard relies is neither controlling nor apposite.

Even If The California Case Law Upon Which Unigard Relies Were Relevant, It Was Not Binding On The Lower Courts Under Guidelines Established By This Court

Unigard's analysis rests on the decision of the intermediate level California Court of Appeal in *Dart Equip. Corp. v. Mack Trucks, Inc.*, 9 Cal.App.3d 837, 88 Cal.Rptr. 670 (1970) (hrg. denied).[2] Recognizing that the sole state case law upon which it relies is the decision of an intermediate state court, Unigard cites certain language of this Court in *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940), and implies that a federal district court must blindly follow intermediate state court decisions in diversity cases. (Petition for Writ of Certiorari at p. 20.) Unigard conveniently ignores this Court's

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[2]The decision in *Dart*, in turn, rests in part on a decision of the California Supreme Court, *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage, Etc. Co.*, 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (1968), in which the court announced, as general rules of contract interpretation, that "the intention of the parties as expressed in the contract is the source of contractual rights and duties" and that parol evidence regarding the parties' intent should not be excluded merely because the language of the contract appears unambiguous on its face. 69 Cal.2d at 38-39, 69 Cal.Rptr. at 564-65, 442 P.2d at 644-45.

comment in *West*, immediately following the quoted language:

> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. American Telephone & Telegraph Co., supra*, 311 U.S. at 237.

More recently, this Court has stated the guidelines as follows:

> "[I]n diversity cases this Court has further held that *while the decrees of 'lower state courts' should be 'attributed some weight • • • the decision* [*is*] *not controlling • • •' where the highest court of the state has not spoken on the point.* [Citation omitted]
>
> • • •
>
> "Thus, under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling.
>
> • • •
>
> "This is not a diversity case but the same principle may be applied for the same reasons, viz., the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. *If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court." Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967), *quoting Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). (Emphasis added.)

Based on these guidelines, the Ninth Circuit has held that where a state's highest court has not addressed the issue involved, "substantial deference" must be given "to the district judge's interpretation of the law of the state in which he sits." *Lewis v. Anderson, supra*, 615 F.2d 778, 781 (9th Cir. 1979), *citing United States v. Valley National Bank*, 524 F.2d 199, 201 (9th Cir. 1975).[3]

Applying this Court's guidelines more specifically, the Ninth Circuit in *Lewis* concluded:

> "The California Supreme Court has never faced the issue presented here; we therefore 'sit as a state court' and look for guidance from intermediate appellate courts in California, *and from courts in other jurisdictions which have recently considered the question.*" 615 F.2d at 781. (Emphasis added.)

This is precisely what occurred in the present case. The district court gave due consideration to the decision of the intermediate California appellate court in *Dart*, and concluded that *Dart* was not controlling. The court then looked to the decisions of the Ninth Circuit and other jurisdictions in trying to determine how the California Supreme Court would decide the issue. The Ninth Circuit, in turn, gave the district court's decision the deference

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[3]Because the district judge's interpretation of the law of the state in which he sits is entitled to deference, "[t]he district court's determination will be accepted on review unless shown to be 'clearly wrong.'" *Clark v. Musick*, 623 F.2d 89, 91 (9th Cir. 1980); *accord, Airlift International, Inc. v. McDonnell Douglas Corp.*, 685 F.2d 267 (9th Cir. 1982). Similarly, where the issue presented is one of state law, this Court ordinarily accepts the determination of such state law by the court of appeal. *Commissioner of Internal Revenue v. Estate of Bosch, supra*, 387 U.S. 456, 462 (1967).

which it was due, and in the process cited additional California case law in support of the district court's decision.*

Thus, even if Unigard were correct in its assertion that *Dart* is *apposite, Dart* was not *controlling,* i.e., not binding on either the district court or the Ninth Circuit. It follows that neither the district court nor the Ninth Circuit departed from the standards established by this court in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938) and its progeny. On the contrary, the lower courts did an admirable job of ascertaining and applying California law in a situation which had never been addressed by the California courts.

The California Case Law Upon Which Unigard Relies Is Not Apposite, And, Accordingly, The District Court And The Ninth Circuit Acted Properly In Relying On Previous Decisions Of The Ninth Circuit And Other Jurisdictions In Ascertaining California Law

Unigard policy definition 1(b) includes as an "assured"

> "any person, organization, trustee or estate to whom the Named Assured [Roberts] is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy. . . ."

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*Unigard cites *Six Companies of California v. Joint Highway District #13,* 311 U.S. 180 (1940) in support of its argument that the lower courts improperly failed to apply controlling California case law. Unigard's reliance on *Six Companies* is misplaced, however. In *Six Companies,* the Circuit Court of Appeals had expressly recognized that the intermediate state court decision was controlling, but refused to follow that controlling authority because it felt the decision was wrong. This Court reversed.

By contrast, in the present case, the district court expressly concluded that the decision of the intermediate state appellate court in *Dart* was inapposite. (See Appendix E to the Petition for Certiorari.) Thus, the lower courts in the present case did not ignore controlling state law in favor of some other rule of decision.

Unigard argues that this clause cannot be interpreted without first referring to the Roberts-Formica contract to determine the scope of coverage which Roberts intended to provide to Formica. In contrast, Formica asserts that the Roberts-Formica contract need only be consulted to determine if Roberts had an obligation to provide to Formica comprehensive liability insurance (i.e., the type of insurance "such as is afforded by [Unigard's] policy"). Once that fact is confirmed (and it is not in dispute in this case), California law requires that the actual scope of Unigard's coverage be determined by the terms of its own policy, and not by reference to the underlying Roberts-Formica contract to which Unigard was not a party.

Initially, Unigard argues that the legal effect of definition 1(b) is to incorporate into the policy the terms of the Roberts-Formica contract. No authority is cited for this proposition, for the simple reason that no authority exists. While it is clear that one contract can incorporate the terms of another, it is equally clear that the Unigard policy does not meet the prerequisites under California law for such an incorporation by reference.

In *Bell v. Rio Grande Oil Co.*, 23 Cal.App.2d 436, 73 P.2d 662 (1937) (hrg. denied), the court of appeal stated:

> "A written agreement may, *by reference expressly made thereto*, incorporate other written agreements; and in the event such incorporation is made, the original agreement and those referred to must be considered and construed as one." 23 Cal.App.2d at 440, 73 P.2d at 663. (Emphasis added.)

This requirement that the document to be incorporated be referenced expressly was elaborated upon in *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.*, 81 Cal.App.2d 437, 184 P.2d 183 (1947), in which it was stated:

> "For the terms of another document to be incorporated into the document executed by the parties *the reference must be clear and unequivocal,* the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." 81 Cal.App.2d at 447, 184 P.2d at 189. (Emphasis added.)

Accord, Williams Construction Co. v. Standard-Pacific Corp., 254 Cal.App.2d 442, 61 Cal.Rptr. 912 (1967).

Clearly, Unigard policy definition 1(b) does not meet this test. The reference in the Unigard policy to "a written contract or agreement" is certainly not sufficiently "express" or "clear and unequivocal" to accomplish an incorporation by reference of the Roberts-Formica contract under the standards set forth above.

Nevertheless, Unigard argues that resort to the underlying Roberts-Formica contract to determine the scope of Unigard's coverage is mandated by the California Court of Appeal decision in *Dart Equip. Corp. v. Mack Trucks, Inc., supra,* 9 Cal.App.3d 837, 88 Cal.Rptr. 670 (1970) (hrg. denied). In fact, the district court correctly concluded that *Dart* is distinguishable and is not dispositive of the present case.

In *Dart*, the named insured, Dart, leased trucks from Mack. Mack requested that Dart obtain insurance coverage to protect Mack from liability for the negligent use of the vehicles leased to Dart. Dart contacted its insurance carrier

and requested that Mack be added to Dart's policy as an additional insured for secondary liability arising out of Dart's use of the vehicles. A certificate of insurance was issued by the insurance company, providing that Mack " 'is hereby made an additional insured but only as respects liability arising out of the use of automobiles in the business of the named insured [Dart], by the named insured, his employees or agents.' " 9 Cal.App.3d at 843, 88 Cal.Rptr. at 674.

Thereafter, a Dart employee was injured while using a Mack truck, and it was determined at trial that the cause of the accident was a defective steering apparatus in the Mack truck. Liability was imposed on Mack based on manufacturer's strict products liability.

Despite Mack's previous request that Dart obtain insurance to protect Mack from liability for Dart's negligent use of the trucks, Mack argued that the policy obtained by Dart also insured Mack for its manufacturer's strict liability. The issue before the court did not relate to the scope of coverage, but to whether coverage existed at all for products liability. Thus, the key issue in the present case (i.e., the *scope* of coverage) was not even raised in *Dart*.

The policy in *Dart* was not clear on its face as to whether coverage was afforded for products liability and the court was therefore forced to examine the underlying contract between Dart and Mack to determine if Dart was obligated to provide that particular *type* of coverage, i.e., products liability coverage.

In the present case, this is analogous to looking to the Roberts-Formica contract to determine if Roberts was obligated to provide to Formica and Cyanamid the type of insurance afforded by the Unigard policy, i.e., compre-

hensive general liability insurance. Formica and Cyanamid have never disputed that the Roberts-Formica contract must be consulted for that limited purpose. This is because it is impossible from the mere language of the Unigard policy to tell if Formica and Cyanamid are insureds. Thus, reference to the underlying contract is necessary to determine if Formica and Cyanamid are insured for comprehensive general liability. It is not necessary, however, to consult the Roberts-Formica contract to determine the scope of Unigard's coverage. The Unigard policy itself clearly and unambiguously defines the scope of coverage.

In short, therefore, *Dart* stands for the proposition that an underlying contract between two insureds can be consulted to determine the *existence* of an obligation to provide a certain type of insurance; it does not permit reference to the underlying contract to determine the *extent* or *scope* of the insurance provided.

Moreover, even if *Dart* was relevant to the issue in the present case, it should be viewed as an aberration, and limited to its own facts. This is because it involved a situation where application of the language of the policy in Mack's favor would have resulted in an absurdity. That is, under Mack's interpretation, the lessee of the vehicle would be providing insurance to the manufacturer for the manufacturer's products liability. Indeed, in at least one later California case, the court recognized that the *Dart* court was trying to avoid an absurd result. *See Charles D. Warner & Sons, Inc. v. Seilon, Inc.*, 37 Cal.App.3d 612, 620-21, 112 Cal.Rptr. 425, 430-31 (1974) ("[W]e believe the holding in Dart is limited to its particular facts. . . . It would have been a perversion of the agreement to hold that

the lessee should indemnify the lessor for the latter's wrongdoing.") Thus, the *Dart* court did nothing more than follow the dictates of § 1638 of the California Civil Code, which provides that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and *does not involve an absurdity.*" (Emphasis added.)

In the more specific context of insurance coverage, the *Dart* decision can be viewed as an application of the well-established rule that "when the strict enforcement of a provision of an insurance policy will result in unreasonable and unjust forfeitures or an absurd result, the courts will refuse to enforce the strict meaning of the language of the policy." *Schilk v. Benefit Trust Life Insurance Co.*, 273 Cal.App.2d 302, 307, 78 Cal.Rptr. 60, 64 (1969) (hrg. denied).

Finally, *Dart* is not controlling even if Unigard's reading of the case were correct. In *Dart,* there was a specific certificate of insurance by which Mack was added to Dart's policy. Thus, Dart and its insurer could conceivably have had some intent, at the time the certificate of insurance was issued, as to the scope of the coverage to be afforded to Mack. By contrast, the status of Formica and Cyanamid as insureds under the Unigard policy was not the result of a negotiated endorsement or certificate of insurance; rather, Formica and Cyanamid are insured by virtue of a standard form definition found in all Unigard policies of this type and vintage. No special request was made by Roberts to include Formica and Cyanamid as insureds.

In other words, this case does not involve a negotiated contract provision designed to meet the specific needs of the named insured, but a standard provision in an adhesion contract, as to which the insured's intent (if any) is irrelevant.[5] Thus, *Dart* is distinguishable and the general rule of interpretation announced in *Thomas Drayage, supra,* does not apply.[6] Indeed, in dealing with the preprinted provisions of an adhesion contract, presented to the insured on a take it or leave it basis, it does not even make sense to speak of the insured's intent.

Instead, this case is controlled by the long accepted principle that any ambiguity in an insurance policy is to be construed strictly against the insurer. *Reserve Insurance Co. v. Pisciotta,* 30 Cal.3d 800, 807-08, 180 Cal.Rptr. 628, 632, 640 P.2d 764, 768 (1982). Thus, as the Ninth Circuit observed in this case, " 'so long as coverage is available under any reasonable interpretation of an ambiguous clause, the insurer cannot escape liability.' " (Appendix A to Petition for Writ of Certiorari, citing *State Farm Mu-*

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[5]In connection with the summary judgment motion in the present case, no evidence was presented as to Unigard's intent in issuing the policy. In any event, "[w]hile extrinsic evidence is sometimes permissible to 'determine the meaning the *parties* gave to the words' of a written agreement [citation omitted], an undisclosed unilateral intent of the insurer of an insurance contract will be deemed 'immaterial' [citations omitted]." *City of Mill Valley v. Transamerica Ins. Co.,* 98 Cal.App.3d 595, 603, 159 Cal.Rptr. 635, 639 (1979) (hrg. denied). (Emphasis in orginal.)

[6]Unigard points out that the rule of the *Thomas Drayage* case applies to insurance contracts, citing *Diamond v. Insurance Co. of North America,* 267 Cal.App.2d 415, 72 Cal.Rptr. 862 (1968). Significantly, *Diamond,* like *Dart,* involved the interpretation of a specially requested endorsement, as to which the insured could have some relevant intent.

tual Automobile Insurance Co. v. Jacober, 10 Cal.3d 193, 197, 110 Cal.Rptr. 1, 3, 514 P.2d 953, 954 (1973).)[7]

Under these circumstances, therefor, it was proper for the district court to conclude that *Dart* is inapposite, and to reach its own conclusion as to how the California Supreme Court would decide the issue. In so doing, the district court was entitled to look to analogous California authority, as well as to the decisions of the Ninth Circuit and other courts which have considered the issue. This is precisely what the district court did, and its interpretation of California law is entitled to deference. *Lewis v. Anderson, supra,* 615 F.2d 778, 781 (9th Cir. 1979). As established below, the district court and the Ninth Circuit, after correctly ascertaining the applicable California law, properly determined that Formica and Cyanamid were entitled to summary judgment.

Based On The District Court's Determination Of The Applicable California Law, The District Court Properly Granted, And The Ninth Circuit Properly Affirmed, The Summary Judgment In Favor Of Formica And Cyanamid

As noted above, Unigard asserts that the rights and duties of Formica and Cyanamid under the Unigard policy

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[7]It should be noted that neither the district court nor the Ninth Circuit found the Unigard policy to be ambiguous. The district court found it to be quite clear. (Appendix E, p. A-12, Petition for Writ of Certiorari.) The Ninth Circuit held that even if the policy were susceptible of more than one interpretation, the district court's interpretation was reasonable, and therefore proper, under California law relating to the interpretation of ambiguous insurance policies. (Appendix A, p. A-2, Petition for Writ of Certiorari.)

cannot be determined without interpreting the Roberts-Formica contract.[8] In fact, Unigard policy definition 1(b)

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[8]It is significant that even if Unigard was correct in its assertion that the Roberts-Formica contract must be interpreted, its interpretation of the contract is wrong. With respect to the interpretation of the contract, Unigard continues to make the same mistake before this Court that it made before the lower courts—it confuses Roberts' duty to indemnify (which did not include the duty to indemnify Formica for its own negligence), with Roberts' duty to purchase insurance for Formica and Cyanamid.

Roberts was required to provide insurance to Formica and Cyanamid "as respects the liability of [Roberts] arising from [the Roberts-Formica contract]." As the manufacturer of Formica #140, Roberts' liability for the product was all-inclusive. Under the California law of strict products liability, Roberts, as manufacturer, would have liability even for those accidents which allegedly were caused by Formica's negligence. *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 261, 37 Cal.Rptr. 896, 898-99, 391 P.2d 168, 170-71 (1964) ("Since the liability is strict it encompasses defects regardless of their source, and therefore a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another. . . . These rules focus responsibility for defects, whether negligently or nonnegligently caused, on the manufacturer of the completed product, and they apply regardless of what part of the manufacturing process the manufacturer chooses to delegate to third parties.").

Thus, while Roberts did not agree to indemnify Formica for its own negligence, it did agree to provide insurance for any negligence by Formica and Cyanamid. Accordingly, Formica and Cyanamid were entitled to summary judgment on the insurance coverage issue even if the interpretation of the policy required interpretation of the Roberts-Formica contract.

Moreover, Unigard mischaracterizes the district court and Ninth Circuit decisions as holding that Formica and Cyanamid are additional insureds under the Unigard policy *for all purposes*. (Petition for Writ of Certiorari, at p. 18.) In fact, respondents never contended (and the lower courts never held) that Formica and Cyanamid were insured for all purposes, but only in connection with the manufacture, sale, handling, storage, quality, labeling and use of Formica #140.

is clear on its face, and can be interpreted with nothing more than a reference to the Roberts-Formica contract to determine that Roberts was in fact obligated to provide general liability insurance to Formica. Accordingly, the interpretive rules which Unigard seeks to rely upon are inapposite and do not answer the question in this case.

Regarding the use of extrinsic evidence to interpret an insurance policy, Couch on Insurance states the general principle as follows:

> "Since all prior negotiations are assumed to be merged in the written contract, the policy itself constitutes the contract between the parties, and if the meaning of the terms of the policy, considered as an entirety, is clear, it alone, in the absence of fraud, accident or mistake, must be looked to in construction. Under such conditions, the court has no right to do more than declare what the plain wording of the contract imports; extrinsic evidence is inadmissible to vary or control the terms of the contract, and the policy will be enforced, if at all, as written.
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> • • •
>
> "A contract different from that made by the parties cannot be read into the policy from the surrounding circumstances, such as the conduct of the parties, to give it either a more extensive or a more limited meaning than that expressed therein." 1 Couch on Insurance 2d, § 15:56 at pp. 746-50. (Footnotes omitted.)[9]

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[9]*See also* 1 Couch on Insurance 2d, § 15:69 at pp. 766-68 (footnotes omitted). ("When the contract is clear, precise and unambiguous in its terms, and the sense is manifest and leads to nothing absurd, there is no proper scope for a resort to rules of construction, even to give effect to the policy. If the express terms and language that the parties have used is not ambiguous or uncertain, it should be given effect as written.")

This rule has been consistently followed in California. *See, e.g., McMillan v. State Farm Ins. Co.*, 211 Cal.App.2d 58, 27 Cal.Rptr. 125 (1962); *Jarrett v. Allstate Ins. Co.*, 209 Cal.App.2d 804, 26 Cal.Rptr. 231 (1962). As stated in *Fullerton v. Houston Fire and Casualty Ins. Co.*, 234 Cal. App.2d 743, 747 44 Cal.Rptr. 711, 714 (1965) (hrg. denied): "While the intentions of an insured and his company are not to be disregarded, mere intent cannot overcome the objective provisions of an insurance policy as actually issued." Given this straightforward rule of interpretation, it is clear that Unigard's attempt to limit its coverage by reference to the Roberts-Formica contract must be rejected.

As found by the district court, the most relevant case authority in the present situation is the decision in *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422 (9th Cir. 1980), in which the Ninth Circuit applied California law. (See Appendix E to the Petition for Writ of Certiorari.) In *Price*, ship owner Zim and stevedoring company ITS entered into a contract for unloading vessels. Among other things, the contract required that Zim would be named as co-insured under ITS's liability insurance policies. After the contract took effect, ITS purchased a comprehensive liability policy from Tokio Marine and Fire Insurance Co. Subsequently, Zim was added to the Tokio policy "'as an additional insured as respects operations performed for Zim. . . .'" 616 F.2d at 425.

The following year, Zim and ITS modified their contract by eliminating the provision which required ITS to have Zim named as a co-insured, but the endorsement adding Zim to the Tokio policy was not explicitly cancelled.

Subsequently, an employee of ITS, who was injured while working on a Zim vessel, sued Zim for negligence and strict liability. Zim tendered the defense to Tokio, which refused to defend. One ground for the refusal was Tokio's contention that the cancellation of the underlying contractual obligation of ITS to insure Zim had the effect of also cancelling the endorsement on the Tokio policy which added Zim as an insured. In other words, Tokio took the same position which Unigard takes in this case, that the coverage obligation expressed in its policy was limited by the named insured's contractual obligation in the underlying contract.

The Ninth Circuit rejected that argument, holding that under the terms of the insurance policy, including the Zim endorsement, Tokio was obligated to assume responsibility for the suit against Zim. As succinctly stated by the court:

> "Tokio's obligations were governed by the insurance policy which it issued, not by the stevedoring contract to which it was not a party." 616 F.2d at 428.

The same result should obtain in the present suit. Unigard was not a party to the Roberts-Formica contract and its obligations must accordingly be governed by the terms of its policy.

A particularly apropos formulation of the Ninth Circuit's conclusion in *Price* is contained in 11 Couch on Insurance 2d (Rev. ed.), which states as follows:

> "The fact that two or more persons are named as the insureds in a given policy does not alter the basic principle that the liability of the insurer is measured by the terms of its contract. Likewise, *the fact that there is an agreement between the insureds which is narrower in scope than the terms of the contract of insurance does*

not detract from the insurer's liability." § 44:255 at p. 399. (Emphasis added.)

This rule, set forth in Couch, was based on the decision in *Sears, Roebuck & Co. v. Hartford Accident & Indemnity Co.*, 50 Wash.2d 443, 313 P.2d 347 (1957). In that case, Sears was the owner of a retail store and adjoining parking lots. One of the parking lots was bordered by a sidewalk and a two-foot strip of land owned by the city. Sears entered into a license agreement with concessionaire Rockey under which Rockey was to locate his business on this parking lot and sell his products.

As a part of the agreement, Rocky was to keep the lot and adjoining city land free of debris and trash occasioned by his operations or by the presence of his customers. Rockey also agreed to:

> "... hold harmless First Party [Sears] from any claim, action, loss, or damage that may arise by reason of [Rockey's] occupancy of said space or the operation of [Rockey's] business or the act or carelessness of patrons of [Rockey] in said area. *And to that end,* [Rockey] shall obtain and maintain in full force and effect policies of insurance in such amounts as [Sears] shall approve in writing. [Rockey] shall obtain particularly policies of insurance for public liability and food liability." 313 P.2d at 348. (Emphasis added.)[10]

Rockey purchased an insurance policy from Hartford, naming both Rockey and Sears as insureds with respect to, among other things, premises liability.

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[10]Note that in contrast to the Roberts-Formica contract in the present case, the indemnity and insurance provisions of the Rockey-Sears contract were expressly made interdependent (i.e., "[a]nd to that end"). *See* footnote 8, *supra.*

Subsequently, Rockey sought and obtained permission from Sears to make permanent water and sewage connections to the city water system. The connections required tearing up the sidewalk and blacktop in the two-foot strip of city-owned land adjacent to the parking lot. After the work was completed, a small hole or dip was left in the blacktop. A Sears customer tripped and fell in or near the hole, and subsequently sued Sears. Sears ultimately settled the suit and then sued Hartford for reimbursement under the policy.

The first question confronting the court was whether the policy covered the injury to Sears' customer, since she was not on the premises for any purpose benefitting Rockey or in any way connected with his business. As noted above, the Rockey-Sears agreement required Rockey to indemnify Sears only for claims arising from Rockey's occupancy of the premises or the operation of Rockey's business or the carelessness of Rockey's patrons, and to obtain insurance to that end.[11]

Hartford sought to limit its coverage, based on the underlying contractual agreement between Rockey and Sears. As stated by the court: "Hartford would have us read the policy in light of the Rockey-Sears license." 313 P.2d at 350.

The court went on to note that the coverage under the Hartford policy was broader than that required by the

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[11]It was never established that the hole actually resulted from Rockey's excavation or that the hole actually occasioned the customer's fall. Had this been established, the accident would have fallen squarely within Rockey's contractual obligations to indemnify Sears for losses arising from the operation of his business and to obtain insurance "to that end."

Rockey-Sears contract and that Hartford "could have defined and limited the coverage it intended to give to Sears, but did not do so." 313 P.2d at 350.

Finally, the court resolved the coverage question as follows:

> "That Sears received a greater coverage than Rockey was obligated to furnish, and than Hartford intended to give, is not a matter with which we are here concerned. Since an insurance policy is merely a written contract between an insurer and the insured, courts cannot rule out of the contract any language which the parties thereto have put into it; cannot revise the contract under the theory of construing it; and neither abstract justice nor any rule of construction can create a contract for the parties which they did not make for themselves." 313 P.2d at 350.

Thus, while Unigard would like to limit the status of Formica and Cyanamid as additional insureds through a restrictive (and unreasonable) interpretation of the Roberts-Formica contract, the decisions in *Price* and *Sears* compel the conclusion that Unigard should be held to the clear and unambiguous language of its policy. Accordingly, the district court properly concluded that Formica and Cyanamid were entitled to summary judgment.

The decision in *Gulf Oil Corp. v. Mobile Drilling Barge or Vessel,* 441 F.Supp. 1 (E.D.La. 1975), *aff'd per curiam,* 565 F.2d 958 (5th Cir. 1978), also supports the district court's conclusion. In the *Gulf* case, Shell Oil Company and ODECO contracted with respect to ODECO's drilling of a relief oil well to assist in fighting a fire on a nearby Shell Oil platform. In the process of drilling, ODECO's barge

damaged Gulf Oil's pipeline and Gulf sued Shell and ODECO. After the execution of the contract, but before the accident, Shell and ODECO amended the contract to provide that Shell would be an additional insured under ODECO's insurance policies. After the accident, Shell stipulated that ODECO was without fault and agreed to indemnify ODECO for any loss arising out of the accident.

ODECO's policy with Highland's Insurance Company contained a provision quite similar to definition 1(b) of the Unigard policy. The Highland's policy stated:

> "'*The unqualified word "Insured"* wherever used, *includes* the Named Insured and also *any* person or *organization to whom* or to which *the Named Insured is obligated by virtue of a written contract to provide insurance such as is afforded by this policy,* but only with respect to operations by or in behalf of or facilities used by the Named Insured.'" 441 F.Supp. at 6. (Emphasis added.)

Highlands argued that under this provision, Shell was an insured, not for its own negligence, but only for claims arising out of the negligence of ODECO, and that because Shell had previously stipulated that ODECO was without fault, no coverage was provided. (Similarly, Unigard interprets the comparable provision of its policy as not insuring Formica and Cyanamid for their own negligence.)

Shell argued that

> "the cited language merely limits coverage to damages incurred while Shell and ODECO were performing their respective obligations under the . . . drilling contract, regardless of who was at fault." 441 F.Supp. at 6.

(Similarly, Formica and Cynamid contend that they are insured under the plain language of the Unigard policy for any injuries or damages resulting from the manufacture, sale, handling, storage, quality, labeling and use of Formica #140, regardless of who is at fault.)

The court in *Gulf* upheld Shell's position, noting that (as in the present case):

> "the policy contains no express exclusion of coverage for damages arising out of the sole negligence of the additional insured. *Had it been the intent of all parties to the contract to exclude coverage for damages arising out of Shell's sole negligence, it would have been simple to express this intent clearly in the policy.*" 441 F.Supp. at 7. (Emphasis added.)

Similarly, in the present case, if Unigard had wanted to limit its coverage for additional insureds, it could easily have done so by including in its definition 1(b) any of a number of limiting statements such as those set out in brackets below:

> [and then only to the extent of the Named Assured's contractual obligation to provide such insurance.]
>
> [and then only to the extent the Named Assured is contractually obligated to indemnify such person, organization, trustee or estate.]
>
> [and then only if such person, organization, trustee or estate is not negligent.]

Like the carrier in *Gulf*, Unigard failed to include such a limitation in its policy, and it would violate the most basic California rules of insurance construction "to read into the policy words that are not there." *VanDerhoof v. Chambon*, 121 Cal.App. 118, 131, 8 P.2d 925, 930-31 (1932) (hrg. denied).

CONCLUSION

A thorough examination of the authorities discussed above makes it clear that the single California Court of Appeal decision upon which Unigard relies does not establish the controlling rule of decision under the undisputed facts in this case. Instead, this case was properly decided on the basis of the courts' decisions in *Price, Sears* and *Gulf*.

More importantly, with respect to the question initially posed by Unigard, it is clear that the district court properly ascertained how the California Supreme Court would decide the case, and applied the law as so found. The Ninth Circuit, in turn, properly accorded the district court decision the deference to which it was entitled.

It follows, therefore, that there was no departure from this Court's guidelines in the handling of this case by the lower courts, and that the Petition for Writ of Certiorari should be denied.

DATED: March 14, 1984

Respectfully submitted,

JEROME I. BRAUN
(Counsel of Record)
WILLIAM R. FRIEDRICH
STEPHEN E. CONE
FARELLA, BRAUN & MARTEL
235 Montgomery Street,
Suite 3000
San Francisco, CA 94104
Telephone: (415) 954-4400
Attorneys for Respondents Formica Corporation and American Cyanamid Company

AFFIDAVIT OF SERVICE

I, Jerome I. Braun, being duly sworn, state as follows:

I am a citizen of the United States and am a member of the Bar of the United States Supreme Court. I am over the age of eighteen years and not a party to the within above-entitled action. My business address is 235 Montgomery Street, Suite 3000, San Francisco, California. On this date I served the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, by placing three true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at San Francisco, California, addressed in the manner set forth below.

Dale E. Fredericks
Roger W. Sleight
Berridge R. Marsh
Rebecca A. Hull
Sedgwick, Detert, Moran & Arnold
111 Pine Street
San Francisco, California 94111

Dated: March 14, 1984

JEROME I. BRAUN

JEROME I. BRAUN

STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO } ss.

On this 14th day of March, 1984, before me Stephen E. Cone, Notary Public in and for the State of California, personally appeared Jerome I. Braun, known to me to be the person whose name is subscribed to this instrument, and acknowledged that he executed it.

STEPHEN E. CONE

STEPHEN E. CONE

OFFICIAL SEAL
STEPHEN E. CONE
NOTARY PUBLIC — CALIFORNIA
City and County of San Francisco
My Commission Expires May 15, 1987

No. 83-1347

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

UNIGARD INSURANCE COMPANY,
Petitioner,

vs.

FORMICA CORPORATION and
AMERICAN CYANAMID COMPANY,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DALE E. FREDERICKS
(Counsel of Record)
ROGER W. SLEIGHT
BERRIDGE R. MARSH
REBECCA A. HULL
SEDGWICK, DETERT, MORAN & ARNOLD
111 Pine Street
San Francisco, California 94111
Telephone: (415) 982-0303
Attorneys for Petitioner
Unigard Mutual Insurance Company

DATED: March 26, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-6300

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

No. 83-1347

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Unigard Mutual Insurance Company respectfully submits the following brief in reply to the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by respondents Formica Corporation and American Cyanamid Company.

THE NINTH CIRCUIT'S UNPUBLISHED DECISION IN THIS CASE IS IN DIRECT CONFLICT WITH ITS OWN RECENTLY PUBLISHED OPINION IN AN ALMOST IDENTICAL CASE

In a case decided less than one week after the appeal in the instant case was argued, a different panel of the Ninth Circuit applied the rule of *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage Etc. Co.*, 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (1968), to interpretation of a surety bond. *United States, Etc. v. National Bonding & Acc. Ins. Co.*, 711 F.2d 131 (9th Cir. 1983).

In *National Bonding,* Standard Conveyor Company (Standard) had a construction contract with the Air Force, and obtained from National Bonding (National) a surety bond covering "all persons supplying labor and material" for the contract. Standard then entered into an agreement with United Electric (United) for the purchase of electrical materials to be used on the job. Before the job was completed, Standard defaulted on the government contract and filed a bankruptcy petition. United, which was still owed money for the materials, filed an action against National on the bond. National moved for summary judgment, contending that its bond did not cover United as a mere supplier of materials. National based its argument on the fact that the bond has been issued in reference to only one of two "line items" in the government contract, and that coverage thereunder should be limited accordingly. United argued that National's liability had to be determined by the terms of the bond without reference to the underlying government contract.

The District Court denied National's motion for summary judgment, ruling that because "no ambiguity as to the coverage appears on the face of the bond," the extrinsic evidence offered by National to show that suppliers were not covered would be "disregarded." 711 F.2d at 132-33.

The District Court subsequently granted summary judgment for United.

On appeal, National argued that the District Court had misapplied the parol evidence rule in refusing to construe the bond in light of the underlying contract. The Ninth Circuit agreed, stating:

> The admissibility of parol evidence under California law is determined according to the procedure outlined in *Brobeck, Phleger & Harrison* v. *Telex Corp.*, 602 F.2d 866 (9th Cir.), *cert denied*, 444 U.S. 981, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979) . . . .
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> Under the principles of *Brobeck, it is clear that the court erred in not considering relevant extrinsic evidence offered by National to prove that coverage under the bond did not extend to suppliers* . . . . Had the district court considered such evidence . . . it might have found the language of the bond reasonably susceptible to National's interpretation. Summary judgment on National's liability under the bond was thus inappropriate.

711 F.2d at 133-34 (emphasis added).

This is precisely what occurred in the instant case. The District Court granted respondents' motion for summary judgment on Unigard's liability under its policy after refusing to consider relevant extrinsic evidence offered by Unigard to prove that coverage under the policy did not extend to insure Formica and Cyanamid for their own fault. During the hearing on the motion for summary judgment, the District Court stated:

> This question comes as the threshold question in the case. And, that is, whether or not the provisions of the Unigard policy are to be limited by terms and conditions contained in a contract to which it is not

a party. The so-called—I'll call it the Roberts' Contract.

• • •

It is the position of the plaintiff Unigard that . . . the court should make a determination as to whether there are any limitations on the obligation to provide . . . insurance contained in the [Roberts] contract.

I reject [that] interpretation.

Petition for Writ of Certiorari, Appendix E, pp. A-10, A-11.

Based on the clear and unequivocal holdings of the California Supreme Court in *Pacific Gas, supra*; the California Court of Appeal in *Dart Equipment Corp. v. Mack Trucks, Inc.*, 9 Cal.App.3d 837, 88 Cal.Rptr. 670 (1970); and the Ninth Circuit, interpreting California law in *National Bonding, supra*, the conclusion is inescapable that the District Court in this case erred in refusing to receive or consider relevant extrinsic evidence as to the intent of the parties to the Unigard policy. This evidence was offered in the form of the Roberts/Formica Agreement, which contract expresses the intent of Roberts and Formica, and thus expresses additionally the intent of Unigard, which intended only to carry out Roberts' insurance obligation as set forth in that underlying contract. Accordingly, summary judgment was improperly granted, and must be reversed.

THE DART DECISION SHOULD HAVE BEEN RECOGNIZED AS CONTROLLING BY THE LOWER COURTS

Respondents argue that even if the decision of the California Court of Appeal in *Dart, supra*, is apposite, it was not binding on the District Court and the Ninth Circuit because it does not represent the law of California as

announced by that State's highest court. (See Respondents' Brief in Opposition, pp. 8-11, citing *Lewis v. Anderson*, 615 F.2d 778 (9th Cir. 1979)). This is plainly wrong, and *Lewis, supra*, is inapplicable in this case.

In *Lewis*, the Ninth Circuit was "[sitting] as a state court" because "the California Supreme Court [had] never faced the issue presented . . . ." *Id.* at 781. In the instant case, the question to be determined by the lower courts was whether extrinsic evidence should be considered in ascertaining the meaning of Unigard's policy. The California Supreme Court *has* directly addressed this issue in its holding in *Pacific Gas, supra*, the antecedent of *Dart, supra*. The court there held, "the intention of the parties as expressed in the contract is the source of contractual rights and duties. A court *must* ascertain and give effect to this intention by determining what the parties meant by the words they used." 69 Cal.2d at 38-39, 69 Cal.Rptr. at 564-65, 442 P.2d at 644-45 (emphasis added). The court further held that it was error to exclude parol evidence regarding the intent of the parties to a written contract merely because the words do not appear ambiguous to the reader. *Id.*

Not only has this rule been well settled by the highest court of the State of California, it has also been recognized by the Ninth Circuit itself as controlling in cases involving contract interpretation. See *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866 (9th Cir. 1979). Thus, *Dart, supra*, represents controlling state authority, and the District Court clearly erred in disregarding it.

THERE WAS NO AMBIGUITY IN THE UNIGARD POLICY

Respondents argue in contradictory fashion that determination of this case is controlled not by fundamental principles of contract interpretation, as expressed by the California courts in *Dart* and *Pacific Gas, supra*, but by the "long accepted" principle that ambiguities in an insur-

ance policy are to be construed strictly against the insurer. (See Brief in Opposition, p. 17.) This is incorrect for two reasons. First, respondents are forced to concede in almost the same breath that neither the District Court nor the Ninth Circuit found the Unigard policy to be ambiguous. (See Brief in Opposition, p. 18, fn. 7.) In fact, the District Court specifically stated: "It appears to me the policy on its face is quite clear . . ." (See Petition for Writ of Certiorari, Appendix E, p. A-12.) Secondly, even if there were an ambiguity in the policy, the holding in *Pacific Gas, supra,* is no less applicable. 69 Cal.2d at 40; 69 Cal.Rptr. at 565-66; 442 P.2d at 645-46.

THE PRICE CASE IS INAPPOSITE

Price v. Zim Israel Navigation Co., 616 F.2d 422 (9th Cir. 1980) is relied on heavily by respondents as support for the contention that the Roberts/Formica contract is irrelevant to the determination of whether or under what circumstances Formica and Cyanamid could be additional assureds under the Unigard policy. Although *Price* involved a fact situation similar to the present matter, the legal issue presented was significantly different.

In *Price,* a contract between Zim and ITS provided that ITS would add Zim as a co-insured on its own liability policy. Pursuant to that agreement ITS caused its insurance carrier to add to the policy a typewritten endorsement *naming* Zim as an insured. Several months later Zim and ITS executed a new contract which contained no requirement that Zim be named as a co-insured on the ITS liability policy. Neither Zim nor ITS requested that the then existing endorsement be cancelled, however. Shortly thereafter, Zim was sued by Price, an injured longshore worker. Tokio, the insurance carrier, refused to defend the suit, in part on the ground that the endorsement naming Zim as an insured had in effect been cancelled.

The focus of the *Price* court was directed to the very narrow issue of whether valid insurance coverage can be cancelled without any communication between the insurer and the insured. *Id.* at 427-28. There was no contention made that Zim had not been intended to be named in the endorsement. Similarly, neither Zim nor ITS argued that the endorsement had not been intended to afford Zim coverage co-extensive with that of ITS. Nor was there any affirmative expression of an intent that Zim's coverage should be discontinued.

Thus, *Price* stands for the proposition that an insurer may not decide, on its own initiative, that an insured wishes to cancel its coverage. The *Price* court's conclusion that the renegotiation of the Zim/ITS contract was irrelevant to Zim's status as an insured was based on the extant written endorsement specifically *naming* Zim as an insured under the policy.

In the instant case, there is no policy provision or endorsement naming Formica and Cyanamid as insureds under the Unigard policy. Here, Unigard's potential obligation to Formica and Cyanamid *is* measured by a contract (the Roberts/Formica Agreement) to which it was not a party. The only claim to coverage that Formica and Cyanamid can make must necessarily be based on Unigard's contract with Roberts, its insured, pursuant to which Unigard agreed to provide coverage in accordance with the terms of contracts negotiated by Roberts with various third parties. Thus, it is essential that the Unigard policy be construed in light of the underlying Roberts/Formica Agreement.

CONCLUSION

It is readily apparent that the Ninth Circuit's unpublished decision in this case is in direct conflict with that court's recently published opinion in *National Bonding, supra.* It is equally clear that the decisions of both the District Court and the Ninth Circuit were in error because of the courts' refusal to consider relevant extrinsic evidence of the parties' intent in construing the Unigard policy, as required by controlling California Supreme Court authority. Because the error in this case is so clear, and so fundamental, petitioner respectfully submits that summary reversal and remand are in order.

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Respectfully submitted,

DALE E. FREDERICKS
(Counsel of Record)
ROGER W. SLEIGHT
BERRIDGE R. MARSH
REBECCA A. HULL
SEDGWICK, DETERT, MORAN & ARNOLD
111 Pine Street
San Francisco, California 94111
Telephone: (415) 982-0303
Attorneys for Petitioner
Unigard Mutual Insurance Company